IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5494 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHABBIRSHA BANUSHA KALAIWALA (SAI)

Versus

STATE OF GUJARAT

Appearance:

MR SHAKTISINH GOHIL for Petitioner

MS HB PUNANI AGP for Respondents

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 29/04/2005

ORAL JUDGEMENT

1. By filing this Special Civil Application under Article 226 of the Constitution of India, the petitioner has challenged the order of his detention passed by the

District Magistrate, Surat, on 29th of January, 2005 in exercise of powers conferred upon him under Section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 ("PASA Act" for short). The petitioner is under detention as cruel person, within the meaning of the PASA Act, from 29th of January, 2005, in pursuance of the above said order of detention passed by the District Magistrate, Surat.

2. The grounds of detention as placed on record reveal that the detaining authority relied upon two types of materials to arrive at the subjective satisfaction. Firstly, the detaining authority took into consideration two crimes registered against the petitioner, and secondly, three in-camera statements, as recorded by sponsoring authority on 24th of January, 2005 as verified by the detaining authority on 28th of January, 2005. The identity of the witnesses is not disclosed by the detaining authority, claiming privilege under Section 9(2) of the PASA Act.

3. Both the crimes registered against the petitioner came to be registered before Palsana Police Station. The first crime was registered on 22nd of January, 2005 for the offences punishable under Sections 5, 6 and 8 of the Bombay Animal Preservation Act, 1954 and under Section 11(l) of the Prevention of Cruelty to Animals Act, 1960. The allegation was that the petitioner was involved in running a slaughter house near village Baleshwar. The second crime was registered on 24th of January, 2005 though the petitioner was arrested on 23rd of January, 2005 at 3.00 p.m. in the first offence. The crime shown at Sl.No.2 was registered against the petitioner on 24th of January, 2005 at 14.30 hours, for the offence punishable under Sections 3 and 8 of the Bombay Animal Preservation Act, 1954, and as per Section-11 (d) (e) & (f) of the Prevention of Cruelty to Animals Act, 1960. The allegation was that the petitioner tethered three cows and five calves behind Harijan Vas of village Baleshwar. The detaining authority considered exhaustively and thoroughly the investigation papers in the above said crimes and came to the conclusion that the petitioner was a habitual offender committing offences punishable under the above said Acts.

4. Out of three in-camera statements, the first witness referred to an incident occurred before three months of recording of his statement. In the evening while he was returning to his residence from his field, he was approached by petitioner and his accomplice on one motorcycle and was told that the numbers of animals

possessing by the petitioner was increasing and, therefore, some of the animals should be kept by the witness at his field and such animals would be recovered by the petitioner when necessity arises. The witness refused the offer of the petitioner. On refusal of the witness, the petitioner was excited and started beating the witness. Though a crowd was gathered but on account of fear of the petitioner, none intervened. Thereafter by act of supplication, witness could save his skin. The second incident occurred before one and half months of the recording of the statement of the witness. At about 2.00 p.m. witness came on main road for going out of town and was waiting on the road. At that time, petitioner came in one tempo, which was loaded with cows and calves and petitioner stopped his tempo near the witness and asked the witness that why the witness was standing there. The petitioner further threatened to the witness that he was keeping watch on illegal activities of the petitioner. When witness noticed that tempo was fully loaded with cows and calves, he requested the petitioner to make cows and calves comfortable in the tempo. On saying so by the witness, the petitioner was excited and stated that witness was not concerned at all and he was taking cows and calves for slaughtering, and saying so, the petitioner started beating the witness along with his accomplices. Though a crowd was gathered but none intervened. Thereafter by act of supplication, witness could save his skin but he was threatened by the petitioner that if witness became obstruction to their business, he would be done to death. The third witness referred to an incident occurred before one month from recording of his statement. In the early morning on that day the witness had been to village Baleshwar and was passing through back side of a Muslim Mohalla from the open space, he found that petitioner and his three accomplices were present and one cow tided with legs was lying on the road. The petitioner had all the weapons to slaughter the cow and they were making preparation for slaughtering the cow. Therefore, the witness went near them and stated that why petitioner and others were slaughtering the cow. Thereupon, the petitioner was got excited and he also instigated his accomplices. So, all of them started beating the witness and stated that instead of cow now slaughter the witness. Ultimately, by the act of supplication, the witness could save his skin but the petitioner threatened that if witness inform anything to anybody he would be done to death.

5. Relying upon the above materials, the detaining authority came to the conclusion that the petitioner was a habitual offender and of cruel mind. The detaining authority concluded that the petitioner was of ferocious

and dangerous tendency and after forming a gang through bullying tactics committed offence under the above two Acts. Whoever objected to the activities of the petitioner, such persons were beaten in the public by the petitioner. On account of fear and terror of the petitioner, no citizens dared to file complaints against the petitioner. In view of the detaining authority, the petitioner was cruel person within the meaning of the PASA Act, and his activities were prejudicial to the maintenance of the public order, and were required to be prevented forthwith. After considering remedial measures available, against the petitioner under the general law, the detaining authority came to the conclusion that the activities of the petitioner were required to be prevented forthwith and, there was no other alternative, except to detain the petitioner under the PASA Act as cruel person. The detaining authority, therefore, passed an order of detention of the petitioner, which is under challenge in this petition.

6. Learned Advocate Mr.Shaktisinh Gohil for the petitioner and learned AGP Ms. Hansa B Punani for the respondents were heard at length.

7. Out of various grounds urged on behalf of the petitioner to challenge the order of detention, as opposed and controverted by learned AGP, it appears that this petition can be examined and disposed of on the sole issue as to whether the detaining authority applied mind properly in branding the petitioner as a cruel person within the meaning of Section-2 (bbb) of the PASA Act.

8. From the rival contentions, it is necessary to observe that in the matter of detention, prime consideration must not be lost sight of that the object of detention law is prevention and not the punishment. It is utmost necessary that while arriving at the subjective satisfaction, the behaviour or the activities of the detenu must be carefully scrutinized by the detaining authority because such behaviour is a core and backbone of the preventive action. The apprehension of the detaining authority about behaviour of the detenu, which might be alleged to be prejudicial to the society must pass through the strict scrutiny of the detaining authority. There must be cogent material before the detaining authority indicating tendency of repeating prejudicial behaviour of the detenu to the society.

9. It must not also be lost sight of that in the present case, the petitioner is branded as cruel person within the meaning of Section 2(bbb), of the PASA Act.

The intention of legislature is very clear from the phraseology used and employed in the statue. It is necessary to reproduce the definition of cruel person as inserted under the PASA Act vide Section 2 of the Amending Act No.16 of 1985, the statue lays down as under:-

"(bbb) "cruel person" means a person, who either by himself or as member or leader of a gang habitually commits or attempts to commit abets the commission of an offence punishable under Section 8 of the Bombay Animal Preservation Act, 1954 (Bom.LXXII of 1954)"

10. Now going through the provisions of the definition of "cruel person", from bare reading of the same, it becomes clear that the legislature intended such behaviours to be branded as behaviour of a cruel person when such person either by himself or as member or leader of a gang habitually commits or attempts to commit or attempts an offence punishable under Section 8 of the Bombay Animal Preservation Act, 1954. The said Section 8 prescribes penalty for the contravention of the provisions of the said Act and the important provisions in the said Act, are grafted in Section 5 so far as the offence part is concerned whereby slaughtering of animals is made prohibited and restricted and is allowed only on certain conditions. There must be overt behaviour of habitually committing the offences as prescribed under the provisions of Bombay Animal Prevention Act, 1954, on the part of detenu, before he is branded as "cruel person".

11. Habitually committing the offence refers to repetitive tendency of human conduct to commit the same act. It is necessary to refer here to the observations made by the Apex Court in the matter of GOPALANACHARI Vs. STATE OF KERALA, as reported in AIR 1981 S.C. 674, while dealing with terminology like "by habit", "habitual", "desperate", "dangerous, "hazardous" etc. with reference to Section 110 of the Code of Criminal Procedure. The Apex Court observed as under in paragraph No.6.

"6. Article 21 insists that no man shall be deprived of his life or personal liberty except according to the procedure established by law. In Maneka Gandhi case(l) this Court in clearest terms strengthened the rule of law vis a vis personal liberty by insisting on the procedure contemplated by Art. 21 having to be fair and reasonable, not vagarious, vague and arbitrary:

The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non- arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action". Nor do we wait for directions from Parliament. The common law has abundant riches; there may we find what Byles, J., called "the justice of the common law".

Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of procedural safeguards and right to a hearing has a human-right ring. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights; observance of fundamental rights is not regarded as good politics and their transgression as bad politics. I sometimes pensively reflect that people's militant awareness of rights and duties is a surer constitutional assurance of governmental respect and response than the sound and fury of the 'question hour' and the slow and unsure delivery of court writ.....

To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available.[(1978) 1 SCC 248 at p. 338 (per Krishna Iyer,J.) : (AIR 1978 SC 597)]

The constitutional survival of s. 110 certainly depends on its obedience to Art. 21, as this

Court has expounded. Words of wide import, vague amplitude and far too generalised to be safe in the hands of the Police cannot be constitutionalised in the context of Art. 21 unless read down to be as a fair and reasonable legislation with reverence for human rights. A glance at s. 110 shows that only a narrow signification can be attached to the words in clauses (a) to (g), "by habit a robber....", "by habit a receiver of stolen property....", "habitually protects or harbours thieve....", "habitually commits or attempts to commit or abets the commission of .... ", "is so desperate and dangerous as to render his being at large without security hazardous to the community". These expressions, when they become part of the preventive chapter with potential for deprivation of a man's personal freedom upto a period of three years, must be scrutinised by the court closely and anxiously. The poor are picked up or brought up, habitual witnesses swear away their freedom and courts ritualistically commit them to prison and Art. 21 is for them a freedom under total eclipse in practice. Courts are guardians of human rights. The common man looks upon the trial court as the protector. The poor and the illiterate, who have hardly the capability to defend themselves, are nevertheless not 'non-persons', the trial judges must remember, This Court in Hoskot's case has laid down the law that a person in prison shall be given legal aid at the expense of the State by the court assigning counsel. In cases under s. 110 of the Code, the exercise is often an idle ritual deprived of reality although a man's liberty is at stake. We direct the trial magistrates to discharge their duties, when trying cases under s. 11(), with great responsibility and whenever the counter-petitioner is a prisoner give him the facility of being defended by counsel now that Art. 21 has been reinforced by Art. 39A. Otherwise the order to bind over will be bad and void. We have not the slightest doubt that expressions like "by habit", "habitual", "desperate", "dangerous", "hazardous" cannot be flung in the face of a man with laxity of semantics. The Court must insist on specificity of facts and be satisfied that one swallow does not make a summer and a consistent course of conduct convincing enough to draw the rigorous inference - that by confirmed habit, which is

> second nature, the counter-petitioner . is sure to commit the offences mentioned if he is not kept captive. Preventive sections privative of freedom, if incautiously proved by indolent judicial processes, may do deeper injury. They will have the effect of detention of one who has not been held guilty of a crime and carry with it the judicial imprimatur, to boot. To call a man dangerous is itself dangerous; to call a man desperate is to affix a desperate adjective to stigmatize a person as hazardous to the community is itself a judicial hazard unless compulsive testimony carrying credence is abundantly available. A sociologist may pardonably take the view that it is the poor man, the man without political clout the person without economic stamina, who in practice gets caught in . the coils of s. 110 of the Code, although, we as court, cannot subscribe to any such proposition on mere assertion without copious substantiation. Even so, the court cannot be unmindful of social realities and be careful to require strict proof when personal liberty may possibly be the causality. After all, the judicial process must not fail functionally as the protector of personal liberty."

[Emphases supplied]

12. Now referring to the facts of the present case, it is clearly borne out that the detaining authority referred to two types of aforesaid materials. Out of which, in-camera statements as recorded by the sponsoring authority and verified by the detaining authority, nowhere on the face of it, it is disclosed that any offence constituting under Section - 8 of the Bombay Animals Preservation Act, 1954 is made out. True it is that, in third statement, some preparation of committing such offence is alleged, but the reach and the consequence and impact of the overall statement, would not lead to an inference that the allegation made therein is in respect of committing offences under Sections 5 and 8 of the Bombay Animals Preservation Act, 1954. On scrutinising the rest of the materials i.e. two crimes registered against the petitioner, it is clear that the first offence is registered against the petitioner for the allegation that he was running slaughter house in abatement of the co-accused. The second offence registered against the petitioner i.e. Crime Register No. 27 of 2005 of Palsana Police Station reveals that petitioner along with other co-accused tethered some

animals behind Harijan vas for slaughtering. It would be premature to say in this proceeding at this stage that whether the offences alleged are made out or not because the cases are pending, but on going through the papers of investigation and first information reports filed, by any stretch of reasoning, it could not be said that the investigation papers reveals or exhibits the habitual tendency of the petitioner to commit such offences especially in view of the decision of Gopalanachari (supra), the habit of doing such acts repeatedly by way of second nature, as a confirmed conduct, only may attract rigorous inference of habitually committing the said offences. So far as preventive detention laws are concerned, phrases employed like "habitual offender" must not be given any laxity in its application to given facts. At the most, in the present case, the two crimes registered against the petitioner, reveals cruelty to animals for which proper proceedings are filed against the petitioner. If the allegations are taken at their face value, it could hardly be said that such allegations disclose habitual tendency of committing the offences by petitioner as envisaged by Sections 5 and 8 of the Bombay Animal Preservation Act, 1954.

15. In the matter of MUSTAKMIYA JABBARMIYA SHAIKH Vs. M.M. MEHTA, COMMISSIONER OF POLICE AND OTHERS, as reported in 1995 (3) SCC 237, the Apex Court after referring to the decision of Apex Court in the matter of Gopalanachari (Supra), while discussing Section 2(c) of the PASA Act and more particularly dealing with the phraseology of "habitually committing offence" employed therein observed as under in para-8.

> "8. The Act has defined "Dangerous person" in clause (c) of Section 2 to mean a person who either by himself or as a member or leader of a gang habitually commits or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Penal Code or any of the offences punishable under Chapter V of the Arms Act. The expression "habit" or "habitual" has however, not been defined under the Act. According to The Law Lexicon by P. Ramanatha Aiyar, Reprint Edn. (1987), p.499, 'habitually' means constant, customary and addicted to specified habit and the term habitual criminal may be applied to anyone who has been previously convicted of a crime to the sentences and committed to prison more than twice. The word 'habitually' mean 'usually' and 'generally'. Almost similar meaning is assigned

> to the words 'habit' in Aiyar's Judicial Dictionary, 10th Edn. p. 485. It does not refer to the frequency of the occasions but to the invariability of practice and the habit has to be proved by totality of facts. It, therefore, follows that the complicity of a person in an isolated offence is neither evidence nor a material of any help to conclude that a particular person is a 'dangerous person' unless there is material suggesting his complicity in such cases which lead to a reasonable conclusion that the person is a habitual criminal. In Gopalanachari v. State of Kerala this Court had an occasion to deal with expressions like "bad habit", "habitual", "desperate", "dangerous", and "hazardous". This Court observed that the word habit implies frequent and usual practice. Again in Vijay Narain Singh v. State of Bihar this Court construed the expression "habitually" to mean repeatedly or persistently and observed that it implies a thread of continuity stringing together similar repetitive acts but not isolated, individual and dissimilar acts and that repeated persistent and similar acts are necessary to justify an inference of habit. It, therefore, necessarily follows that in order to bring a person within the expression "dangerous person" as defined in clause (c) of Section 2 of the Act, there should be positive material to indicate that such person is habitually committing or attempting to commit or abetting the commission of offences which are punishable under Chapter XVI or Chapter XVII of IPC or under Chapter V of the Arms Act and that a single or isolated act falling under Chapter XVI or Chapter XVII of IPC or Chapter V of Arms Act cannot be characterized as a habitual act referred to in Section 2(c) of the Act."

[Emphasis supplied]

16. In view of the above discussion, the order passed by the detaining authority, which is under challenge in this Special Civil Application, is required to be quashed on the grounds discussed above.

17. In the result, the petition is allowed. The order passed by the District Magistrate, Surat, on 29th of January, 2005, against the petitioner in exercise of powers under Section 3(1) of the PASA Act is hereby quashed and set aside. The detenu - Shabbirsha Banusha

Kalaiwala (Sai) is hereby ordered to be set at liberty forthwith if he is not required to be detained in jail for any other purpose. Rule is made absolute. Direct service is permitted.

[J. R. VORA,J.]

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